

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALICIA DUNCAN

Claimant

VS.

**WESTERN PLAINS REGIONAL
MEDICAL CENTER**

Respondent

AND

**AMERICAN ZURICH INS. CO. and
TRAVELERS PROPERTY CAS. CO.
OF AMERICA**

Insurance Carrier

Docket No. 1,025,851

ORDER

Claimant requested review of the December 15, 2006, preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The Administrative Law Judge (ALJ) found that claimant failed to make a timely written claim and, accordingly, denied claimant's request for medical treatment.

This is a claim for injuries to claimant's bilateral upper extremities and shoulders. Claimant contends the ALJ erred in finding that she failed to make a timely written claim and in denying her request for medical treatment. In her letter brief to the Board, claimant asserts:

It is clear that the claimant has proven a series of injuries beginning on October 21, 2002 and continuing until her termination on September 2, 2005. Based on the series alleged, and the injuries aggravating on each and everyday worked, notice [sic] by Claimant was timely.¹

¹ Claimant's letter brief filed Jan. 19, 2007.

Respondent and its insurance carrier Travelers Property and Casualty Company of America (Travelers) argue there is no evidence of a series of alleged accidents. Therefore, respondent/Travelers assert that since Travelers' coverage started on May 1, 2005, it has no liability in this matter. Respondent/Travelers also contend there is no timely written claim for a date of accident of October 21, 2002, and the ALJ's order should be affirmed.

Respondent and its insurance carrier American Zurich Insurance Company (Zurich) contend that claimant did not file a timely written claim for compensation and request that the Board affirm the ALJ's Order Denying Medical Treatment. In the event the Board finds claimant had a repetitive injury, respondent/Zurich argue that respondent/Travelers would be wholly liable for the entirety of the claim pursuant to the "last injurious exposure" rule, citing *Kimbrough*², *Treaster*³ and *Helms*⁴.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Respondent is a health care facility. Claimant started working for respondent on August 11, 1996, in the housekeeping department of the hospital. On October 21, 2002, claimant noticed problems with her right arm and shoulder. She said the pain got worse every day. She reported the claim to her supervisor and was sent to see Danny Briggs, a physician's assistant, who gave her Ibuprofen. She was treated by Mr. Briggs in October and November 2002, and then his treatment was discontinued. She continued to perform the same type of work she had been doing previously, and the problem in her right arm and shoulder continued to get worse each day that she continued to work.

Claimant stated that she did not see a doctor again for problems to her right shoulder until August 2005. She stated however, that after treatment with Mr. Briggs was discontinued, she continued to go to the emergency room at respondent during her work hours from 2002 through 2005 to get something for her pain. She said she was given bottles of Advil or Tylenol. She would tell the emergency room personnel she was having pain in her right arm and shoulder from her work, which she claims had never gotten better after the October 2002 injury. She testified she told her supervisor or the personnel manager at respondent that she was still having problems with her right shoulder and arm.

² *Kimbrough v. University of Kansas Medical Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

³ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

⁴ *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

Claimant eventually also made a workers compensation claim for problems with her left arm and shoulder which she likewise attributed to her ongoing work at respondent. She alleges that she was overusing her left arm and shoulder after having problems with her right. On August 23, 2005, claimant went to the emergency room complaining of bilateral shoulder and arm problems. She was seen by Dr. Carol Johnson. An accident report was filled out dated August 23, 2005, wherein claimant stated she was having problems with her shoulders and arms from lifting heavy bags. Claimant testified she placed a copy of this report on her supervisor's desk that day and talked to her supervisor the day after. She did not ever go to the human relations department and said she was not given the chance and never had time. Claimant testified that even after telling respondent of her problems on August 23, 2005, respondent did not initiate any additional medical treatment on her behalf.

Claimant next saw Dr. James Moffitt in the emergency room at respondent on August 25, 2005, at which time she received two shots, one for pain and one for sleep. On October 6, 2005, she was seen by Dr. Armando Perez. By that time, claimant had been terminated by respondent, and she went to see Dr. Perez on her own. Claimant says the pain in her shoulders is worse now than when she was terminated by respondent in September 2005. She claims that her problems with her shoulders is a result of her continuing to work at respondent from 2002 until her termination.

A preliminary hearing was held on April 12, 2006, after which the ALJ ordered that claimant be examined by Dr. Pat Do for the purpose of determining if additional treatment is necessary and, if so, whether the need for treatment is a result of claimant's work-related injury. Dr. Do saw claimant on June 14, 2006. After examining claimant, Dr. Do diagnosed her with bilateral shoulder pain with impingement. He recommended x-rays and MRIs of claimant's bilateral shoulders and aggressive physical therapy to increase strength and range of motion. He stated that claimant could benefit from subacromial injections and trigger point injections. He stated that if conservative treatment fails, she may be a candidate for shoulder arthroscopy.

Dr. Do opined that claimant's complaints were directly caused by her work at respondent. In a letter dated August 7, 2006, Dr. Do clarified that it was his opinion that claimant's right shoulder injury was a direct result of her accident of October 21, 2002, and that her left shoulder pain was a consequence of the same injury of October 21, 2002, from overuse due to the initial injury.

A second preliminary hearing was held on December 13, 2006.⁵ The ALJ heard additional testimony from claimant and arguments from counsel. Respondent/Zurich

⁵ The transcript of the preliminary hearing is dated December 26, 2006, and is stamped as being received on December 27, 2006. However, the Division's action codes (*i.e.* the ALJ's docket entries) show that the preliminary hearing was held on December 13, 2006, and the Order Denying Medical Treatment is dated December 15, 2006.

argued that no timely written claim was filed after the initial accident in October 2002 and that claimant received treatment and was released to full duty in November 2002. No written claim was made and no further medical was authorized. Therefore, Respondent/Zurich argued that it was not liable on this claim. Respondent/Travelers argued that Dr. Do's report related all claimant's problems to the October 2002 accident and, therefore, it was not liable for the claim since its coverage did not commence until May 1, 2005. On December 15, 2006, the ALJ denied claimant's request for medical treatment based on a failure to make timely written claim.

K.S.A. 44-520a(a) provides:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

Claimant alleges she suffered a "[s]eries of injuries beginning on or about 10/21/02 until her termination date 9/2/05."⁶ Clearly, if claimant's last day worked is claimant's date of accident, then her written claim of October 21, 2005, was timely.

It is impossible to determine how the ALJ reached the conclusion that written claim was not timely because the ALJ's order only says, "Claimant failed to make timely written claim, therefore, Claimant's request for medical treatment is hereby denied."⁷ The ALJ made no findings as to when claimant's accident or series of accidents occurred nor when claimant made written claim for compensation. Counsel for Respondent/Travelers argues that "[s]ince the only date of accident was October 21, 2002, and the respondent only paid for two visits to the doctor in October and November 2002, there is no evidence of timely written claim for such an accident."⁸ Counsel for Respondent/Zurich argues that claimant's October 21, 2005, Application for Hearing does not satisfy the written claim requirement because "[t]he totality of the evidence in this case clearly does not show a written claim within 200 days of her release to work in November, 2002, nor any cause for tolling this statutory requirement."⁹ But counsel for Respondent/Zurich also argues:

⁶ Form K-WC E-1 Application for Review filed Oct. 21, 2005.

⁷ ALJ Order Denying Medical Treatment (Dec. 15, 2006).

⁸ Respondent/Travelers' letter brief to the Board at 2 (filed Jan. 26, 2007).

⁹ Respondent/Zurich's brief to the Board at 4 (filed Jan. 29, 2007).

If the claimant is determined to have sustained an ongoing repetitive injury to her shoulders, the date of accident is the last day claimant worked for the respondent. Here, the claimant continued to perform her regular duties until at least August, 2005. As a result, the carrier who has coverage on the accident date would be liable for the entirety of this claim.¹⁰

Based on the record presented to date, this Board Member finds that claimant suffered ongoing aggravations and worsening of her condition each working day and, thus, sustained a series of accidents through September 2, 2005. Neither Respondent/Travelers nor Respondent/Zurich disputes that claimant's Application for Hearing filed October 21, 2005, constituted timely written claim for a series of accidents.¹¹ Instead, respondent and its insurance carriers argue that claimant suffered only a single accident on October 21, 2002, and any worsening, including any new condition in the left arm and shoulders, would be attributable to that same single accident date as a direct and natural consequence of the original right arm and shoulder injury. Accordingly, because there was a series of accidents as opposed to a single accident, claimant's written claim of October 21, 2005, was timely. Furthermore, as claimant's accidents and injuries occurred during both Travelers' and Zurich's periods of coverage, respondent, Travelers and Zurich will be jointly and severally liable for any preliminary medical treatment benefits ordered by the ALJ.¹²

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁴

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated December 15, 2006, is reversed, and this matter is remanded to the ALJ for further orders consistent herewith.

¹⁰ *Id.* at 5.

¹¹ Although no party argues it, the Employee Injury/Illness Treatment reports dated October 23, 2002; November 13, 2002; October 25, 2004; and August 23, 2005, may likewise constitute written claims for compensation. Duncan Depo., Ex. 1. Furthermore, at page 41 of the transcript of the April 12, 2006, Preliminary Hearing, the ALJ mentions the possibility that this treatment could extend the time from which the 200 days for written claim runs.

¹² See *Tull v. Atchison Leather Products, Inc.*, ___ Kan. App. 2d ___, ___ P.3d ___ (2007), 2007 WL 78985.

¹³ K.S.A. 44-534a.

¹⁴ K.S.A. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of February, 2007.

BOARD MEMBER

- c: C. Albert Herdoiza, Attorney for Claimant
Jeffery C. King, Attorney for Respondent and its Insurance Carrier Travelers
Property Cas. Co. of America
Jason J. Montgomery, Attorney for Respondent and its Insurance Carrier American
Zurich Ins. Co.
Pamela J. Fuller, Administrative Law Judge